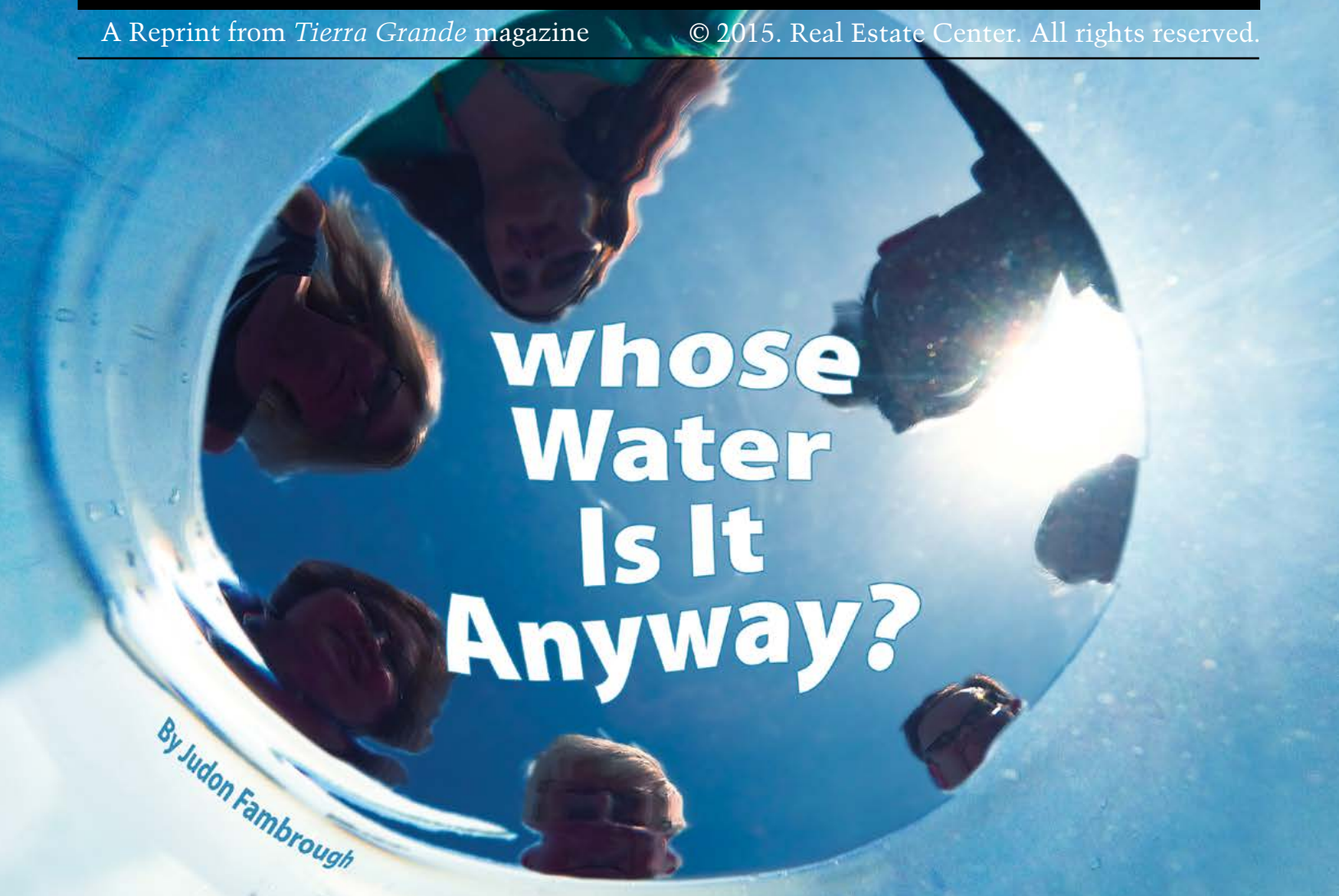
A Reprint from *Tierra Grande* magazine



Whose Water Is It Anyway?

By Judon Fambrough

Texas faces a water crisis. As demand rises and supply dwindles, the use and ownership of water weighs on the minds of politicians, developers, consumers, landowners and attorneys. In November 2013, Texas voters approved Proposition 6, a constitutional amendment allowing the removal of $2 billion from the state's "rainy day fund" to finance water projects for the next 50 years.

In the past, minerals played a key role in real estate transactions. Now, water shares the attention. Do landowners own or have the right to use the water located on and under their property? Where does water fit into scheme of property rights? The answer to these and other questions depends, for the most part, on location.

Texas recognizes four categories (or locations) of water, two on the surface and two in the ground. The two on the surface are diffused surface water and water in a watercourse. The two below the surface are percolating groundwater and water in an underground stream or lake. While the state owns most surface water, most, if not all, groundwater is privately owned.

Diffused Surface Water

Texas case law describes diffused surface water as moisture spread over the earth's surface after a rainstorm or snowmelt, following no defined course. It retains this status as long as it does not reach a watercourse or natural impoundment such as a stream or lake, or has not evaporated or soaked into the ground. If diffused surface water is captured, it belongs to the landowner. Rain running off a roof exemplifies a good source of privately owned water.

Liability for diverting surface water onto another's property varies. If diffused surface water is diverted and damages a neighbor's property, the landowner is liable. However, if the water is in a watercourse, no liability arises. Location is critical.

Water in a Watercourse

Texas owns the surface water in a watercourse. Case law defines a watercourse as a channel with a defined bed, visible banks and an intermittent flow (supply) of water. The channel can be reasonably defined and the flow seasonal. The bed and banks can be slight, imperceptible or even absent in some cases. The channel may be dry for long periods.

Texas statutes relegate the ownership of water in a channel and other confinements to the state. Section 11.021 of the Texas Water Code (TWC) describes it this way: "The water of the ordinary flow, underflow and tides of every flowing river, natural stream and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater and rainwater of every river, natural stream, canyon, ravine, depression and watershed in the state **is the property of the state.**"

SUNSET ON THE COLORADO RIVER
in Pace Bend Park, Spicewood, Texas.

While landowners do not own this water, they have the right to use it for limited purposes. If a flowing stream is located on or abuts the property, landowners may use the flow for household and domestic purposes, including watering of livestock, according to a concept known as *riparian water rights*.

The basic principle of riparian use is that each owner has the right to use the water flowing over his or her land, in its natural current, without diminution or obstruction. The use must be beneficial and reasonable but may not inflict undue injury on downstream users.

Impounding Surface Water

Typically, landowners desire to impound the water in a stream or gully to create a pond or lake for livestock and/or recreational purposes. Because this water is state owned, is a permit required?

The answer depends on the size of the proposed impoundment. A property owner may construct a dam or reservoir on his or her property without a permit as long as the normal storage capacity does not exceed 200 acre feet (Section 11.142, TWC). The water may be used for domestic and livestock purposes only. No commercial use is allowed without a permit.

Larger impoundments face more restrictions. Owners must meet the dam safety requirements specified in section 12.052 of the TWC unless the maximum capacity is less than 500 acre feet, the impoundment lies outside the boundaries of the corporate limits of a municipality and the county has a population of less than 350,000, among other things.

To make any commercial use of state water, either impounded or in a watercourse, requires a permit. Permitting is beyond the scope of this article except to say permits are based on prior appropriation, meaning the first in time, first in right. Permits are issued until a stream is totally appropriated. During droughts, landowners with the oldest permits get first rights.

However, according to case law, landowners' riparian rights supersede the state's appropriation rights. This means the state cannot defeat a landowner's riparian rights by over appropriating (over permitting) a stream.

Ownership of Spring Water

If a spring originates on the property, does the water belong to the landowner or to the state? The answer depends on whether the water flows off the property.

When the water establishes a permanent stream or watercourse on or across another's land, the owner of the land where the spring originates cannot claim ownership. The landowner does, however, have riparian rights along with other downstream users.

When the natural flow of the spring water does not pass beyond the landowner's boundaries but either soaks into the ground or flows in a course that does not leave the property, the water belongs to the landowner.

Even though the water may flow off the property, it may still be considered privately owned as long as the flow is so insufficient as to be of no value to another riparian owner or if the flow does not add perceptibly to the volume of a stream.

Minerals and Watercourses

In Texas, the ownership of the minerals under a watercourse (stream) depends on whether the stream is navigable. The state owns the minerals beneath the streambeds of navigable watercourses. In addition, the public has the right of ingress and egress up and down the streambed.

But at what point on navigable streams does state ownership end and private property begin? Case law places the point at the gradient boundary line. This point lies midway between where the lower level of the flowing water just reaches (touches) the cut bank and the higher level where it overtops the cut bank. On some streams, the determination requires a sophisticated survey.

If a stream is not navigable, the state still owns the water, but the minerals beneath the streambed are privately owned and the public has no right of entry. The key component is navigability. The law contains two definitions.

A stream may be navigable-in-law or navigable-in-fact. A stream navigable-in-law retains *an average width of 30 feet from the mouth up* (Section 21.001, Texas Natural Resources Code). The amount of water is irrelevant. A stream navigable-in-fact is less than 30 feet and can be used, in its natural and ordinary condition, as a highway for commerce in the customary modes of trade and travel.

The courts struggle to apply these definitions to actual conditions. For example, a recent case held that the "30 feet from the mouth up" does not mean a measurement between the gradient boundary lines on opposite banks. Instead, the measurement lies between points determined by the courts (*Hix v. Robertson, 211 SW 3rd 423).*

Likewise, another case held that it is practically impossible to determine when a stream is navigable-in-fact. According to the court, "a stream navigable in fact is not susceptible of definition or determination by a precise formula that fits every type of stream or body of water under all circumstances and at all times" *(Taylor Fishing Club v. Hammett, 88 SW 2d 127).*

Percolating Groundwater

Percolating groundwater is water oozing, seeping or filtering through the soil following no defined channel or course. It is quite similar to diffused surface water except it is below the surface. All groundwater is presumed percolating and privately owned. Many Texas farmers and ranchers depend on this source of water for their livelihood.

When the minerals and surface estates are severed, who owns the percolating groundwater: the mineral owner or the surface owner? The answer depends on the wording of the reservation. Typically, the deed recites that the seller conveys the surface and reserves (retains) the *minerals* or *oil, gas and other minerals*. If groundwater is not mentioned in the reservation, then it belongs to the surface owner.

The rule of capture governs the production of percolating groundwater just as it does oil and gas. The rule permits the drainage of groundwater (and oil and gas) from underneath a neighbor's property (and vice versa) as long as it occurs from a legal location. The legal location for groundwater depends on whether a groundwater district has jurisdiction.

If there is jurisdiction, the groundwater district dictates the minimum distance from a property line. Likewise, the groundwater district may impose pumping limits. If there is no groundwater district, there are no required distances from a property line for a water well location and no pumping limits.

Production from a legal location does not shield the landowner from liability. Texas law still imposes damages if the drainage:

- negligently causes subsidence,
- causes waste or
- maliciously injures a neighbor.

Water in Underground Streams and Lakes

While all groundwater is presumed to be percolating and privately owned, groundwater located in an underground stream or lake belongs to the state. However, so far the presumption of percolating groundwater has not been overcome.

Section 36.002 of the TWC supports this position with this language: "(T)he Legislature recognizes a landowner owns the groundwater *below* the surface of the landowner's land as real property." Taken literally, the statement precludes the state from ever owning any groundwater in an underground stream or lake. However, even though the groundwater may be privately owned, Section 36.002 goes on to say that the use of the groundwater is subject to a groundwater district's well spacing and pumping limits.

The 84th Legislative Session

Three bills passed by the 84th Legislative Session impact water and water rights. Landowners, especially surface owners, should be aware of these changes.

First, House Bill 4112 put to rest the question of whether the statutory changes added by the 82nd Legislative Session to the Water Code in 2011 changed the existing common law. The House Bill, effective Sept. 1, 2015, amended Section 36.002 of the Water Code to preserve all common law rights in effect at the time.

The changes in essence provide the following. The groundwater ownership and rights described in Section 36.002 of the Water Code entitle landowners to have any other rights recognized under the common law. Likewise, the rights described in the statutes do not affect the existing common law defenses and other defenses to liability under the rule of capture.

The second change affects both residential and commercial landowners adjoining water impoundments having a storage capacity of at least 5,000 acre feet at their normal operating levels. The new statute, effective Sept. 1, 2015, amends Section 5.019 of the Property Code to require landowners, when selling the property, to give a specific notification to the buyer that the water level in the reservoir may fluctuate.

The notice must be given on or before the effective date of the sales contract. It must state that the water level of the impoundment adjoining the property fluctuates for various reasons including the result of:

- an entity lawfully exercising its right to use the water stored in the impoundment or
- drought or flood conditions.

If the notice is not timely delivered to the buyer, the purchaser may terminate the contract for any reason within seven days after the notice is delivered or within seven days after the required information is received from a third party.

If the transaction closes, the buyer may sue the seller for misrepresentation if the notice was not timely delivered when the seller had actual knowledge that the water level fluctuates for various reasons, including the reasons stated in the required notice.

Finally, another required notice implemented by House Bill 1221 amends Section 5.008(b) of the Property Code. The required laundry list of disclosures associated with the sale of residential property having not more than one dwelling unit now includes a *yes* or *no* answer to the following question. Are you aware of any portion of the property being located in a groundwater conservation district or in a subsidence district?

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THE TAKEAWAY

Water is an increasingly valuable commodity in Texas and is gaining prominence in real estate transactions. The ownership and use of water depends on location. Most surface water is owned by the state, while most underground water is privately owned and can be conveyed or reserved.

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979-845-2031

Tierra Grande (ISSN 1070-0234) is published quarterly by the Real Estate Center at Texas A&M University, College Station, Texas 77843-2115. Subscriptions are free to Texas real estate licensees. Other subscribers, $20 per year. Views expressed are those of the authors and do not imply endorsement by the Real Estate Center, Mays Business School or Texas A&M University. The Texas A&M University System serves people of all ages, regardless of socioeconomic level, race, color, sex, religion, disability or national origin. Photography/Illustrations: JP Beato III, pp. 1, 2; Robert Beals II, p. 1.

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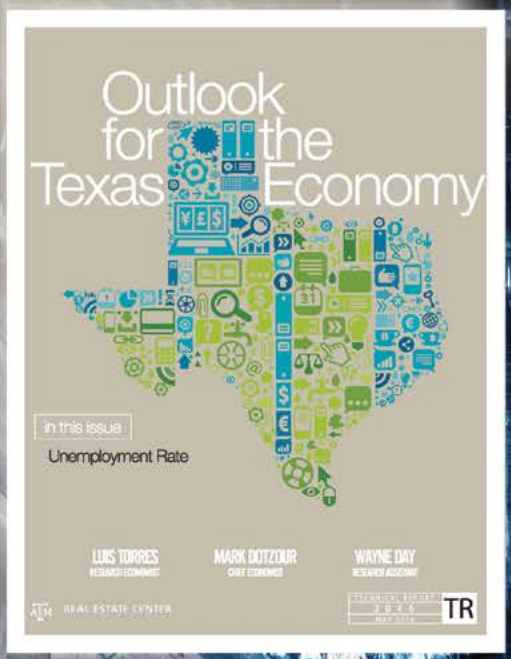

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